

MABEL TATSHI NDLOVU

Versus

PATRICK ABEDNIGO NDLOVU

And

LINDELWE LAURATTA MLOTSHWA

And

THE REGISTRAR OF DEEDS, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 14 AND 20 MAY 2010

M Dube for the applicant
L Chikwakwa for 1st respondent
J Sibanda for 2nd respondent
No appearance from 3rd respondent

Opposed Court Application

KAMOCHA J: The applicant was married to the first respondent until their marriage was dissolved by this court on 20 October 2005. The court ordered, *inter alia*, that the matrimonial house which is stand number 632 Nketa be evaluated by a reputable estate agent and the net proceeds be shared as follows: (a) applicant 40%; and (b) 1st respondent 60%.

Two years later the applicant filed an application under case number 614/07 and was granted a judgment by default entitling her legal practitioners to be the only ones vested with the authority and powers to sell the house.

In an effort to ensure that the first respondent became aware of the judgment the applicant's legal practitioners addressed the following letter to him.

"21 May 2007

Mr Patrick A. Ndlovu
632 Nketa 6
Bulawayo

Dear Sir

Re: Mabel T. Ndlovu vs Yourself & Another HC 614/07

The above matter refers.

We advise that we have since obtained an order to have the property sold through us, Messrs Cheda & Partners. The order was obtained on 17 May 2007 and copy of same is attached hereto for your attention.

Further, we are proceeding to instruct evaluators (Knight Frank) to evaluate the house as per the court order. If you have any buyers, please refer them to us.

Let us hear from you

Yours faithfully

Cheda & Partners”

The above letter with the court order attached to it was delivered at house number 632 Nketa 6 – “the house” on the day it was written. The applicant alleged that the 1st respondent received the letter and the court order. He even suggested that he was in a position to send to the applicant’s legal practitioners buyers offering more money. He, however, never did so.

Instead on 4 September 2007 he entered into a memorandum of agreement of sale of the said house for two billion dollars with Lindelwe Lauratta Mlotshwa. The purchase price was paid upon signing. Applicant contended that the purchase price was unreasonably low and was even contrary to what the first respondent had told her when he visited her at her flea market stand when the two discussed the court order. He had allegedly informed her that he had buyers offering three billion dollars as at that time. Further and even worse, was the fact that the 1st respondent had acted contrary to the court order.

On the other hand the first respondent has vehemently denied ever being aware of the court order at the time he sold the house. His assertion is that he no longer lived at the property and the applicant was aware of that. She allegedly knew that he lived at stand number 4 Decide Village, Lonely Mine, Inyathi. She, on numerous occasions allegedly sent their children there to collect school fees and money for groceries. He complained that she was actuated by malice when she had the court order delivered at the house in order to deprive him of the opportunity to be heard. He flatly denied ever being made aware of the court order let

alone discussing it with the applicant. He maintained that when he sold the house to an innocent third party he had no knowledge whatsoever of the court order.

The applicant's response to the first respondent's averments was that there was no truth in the suggestion that any children had been sent to his Inyathi home to collect fees and money for groceries. She went on to allege that he in fact did not support his children at all. The correct position, according to her, was that he frequented her flea market stall to collect money not the other way round.

On the issue of him not being aware of the court order she said he could not have been telling the truth because she herself did confirm with him that he had seen it which explains why he had said he had buyers who were prepared to make higher offers. She said since the letter of 21 May 2007 *supra* was delivered at the house he must have seen it but is just being selective of what to receive and what not to. He has been receiving other processes through that address. For instance, service of the present application was effected through that same address and he has received all the process. The court application was delivered at the house on 23rd January 2008 and 6 days later i.e. 29 January 2008 he had filed his notice of opposition.

At the hearing 1st respondent's legal practitioner raised for the first time, the point that the service of the letter of 21 May 2007 and the court order was contrary to the provisions of Order 5 Rule 37(l) which stipulated that service of a court order shall be effected by the Sheriff or his deputy. This was an afterthought as the 1st respondent throughout his papers had not relied on those provisions. In the interest of justice I would condone the departure from the provisions of Rule 37(l) as I feel this is a proper case for so doing in terms of Rule 4C(a).

I am satisfied that the 1st respondent was aware of the court order at the time he sold the house on 4 September 2008. He did so in a flagrant disregard of the court order.

Having made that finding it therefore follows that the sale of the house in defiance of the court order was a nullity. The 1st respondent had no right and power to sell the house. His purported sale to the second respondent was just an act in futility as he could not exercise rights which he did not have.

As regards the transfer of the property into the 2nd respondent's names it is clear from a letter from her legal practitioners dated 2 November 2007 filed of record that she was no longer an innocent transferee at the time of transfer if it was effected. She was at that time quite aware of the dispute between applicant and 1st respondent. Had the sale been valid she would have had only herself to blame.

I now turn to the question of costs. This, in my view, is a proper case to award an order of punitive costs against the 1st and 2nd respondents. The 1st respondent sold the house in flagrant defiance of a court order. Such conduct cannot be tolerated and needs to be adequately punished. Similarly the second respondent having become aware of the wrangle between applicant and 1st respondent should have withdrawn from the ill-conceived sale. Instead she, through her lawyers, was frantically trying to register transfer into her name. That type of conduct should always be frowned upon and punished with an appropriate order of costs.

In the result I would issue the following order.

It is ordered that:-

- (1) the agreement of sale of stand number 632 Nketa Township of Lot 400 A Umganin, Bulawayo entered into by and between Patrick Abednico Ndlovu and Lindelwe Laurrate Mlotshwa on 4 September 2007 be and is hereby declared invalid.
- (2) if the 2nd respondent has taken occupation, it is hereby ordered that she and all those occupying through her vacate stand number 632 Nketa, Bulawayo within 15 days of this order; and
- (3) the 1st and 2nd respondents shall bear the costs of suit on an attorney-client scale jointly and severally one paying the other to be absolved.

Messrs Cheda & Partners, applicant's legal practitioners

Sansole & Senda, 1st respondent's legal practitioners

Job Sibanda & Associates, 2nd respondent's legal practitioners